No. 15,338

IN THE

United States Court of Appeals

For the Ninth Circuit

ALTHEA G. WILLIAMS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

Plaintiff filed a complaint under the Federal Tort Claims Act against the United States of America for damages for personal injuries (R. 1*). The District Court had jurisdiction under 28 U.S.C., §1346(b). The case was first tried before Chief Judge Roche, whose memorandum opinion is reported at 105 F. Supp. 208. Judgment originally went against plaintiff and for defendant (R. 52). Thereupon an appeal was had to this Court (R. 53), and the judgment of the District Court was affirmed (R. 183). The opinion of

*Record references throughout this brief will be as follows: "R." shall refer to the printed record before the U. S. Supreme Court; "T.R." shall refer to the typewritten record on this appeal.

this Court is reported in 215 F. 2d 800. Plaintiff thereupon petitioned the United States Supreme Court for a Writ of Certiorari, which petition was granted (R. 183). The United States Supreme Court then issued its mandate, vacating the judgment of the Court of Appeals and remanding the case to the District Court for reconsideration (T.R. 1). Its opinion is reported at 350 U.S. 857.

Plaintiff accordingly moved the District Court for judgment or for new trial (T.R. 2). This motion was denied (T.R. 16) and the District Court on July 12, 1956, gave judgment to defendant and dismissed plaintiff's complaint (T.R. 15, 16). Judge Roche's second memorandum opinion is reported at 141 F.S. 851. Plaintiff filed her Notice of Appeal to this Court on July 25, 1956 (T.R. 17). This Court has jurisdiction to review the judgment under 28 U.S.C. §1291.

STATEMENT OF THE CASE.

Plaintiff filed her complaint in the District Court under the Federal Tort Claims Act to recover damages for severe and painful permanent injuries sustained through the negligent driving of a United States Government vehicle by a soldier on the Island of Guam (R. 1). Plaintiff contends that the soldier was acting within the scope of his employment at the time of the accident. The respondent United States filed an answer denying all allegations as to negligence, scope of employment, causation, injuries, and amount of damages (R. 6).

Prior to filing its answer, respondent moved for a summary judgment on the grounds that the soldier at the time of the accident was not acting in the line of duty nor in the course of employment by the United States (R. 3).

Reference was made in the motion to records on file in respondent's San Francisco office. Plaintiff filed her affidavit in opposition to the motion, stating that at the trial she would develop the liability of respondent based upon these facts: The vehicle driven by the soldier and which caused injuries to plaintiff was an Army weapons carrier owned by the respondent. There had been delivered to the soldier, for recreational purposes, a pass and a trip ticket issued for the vehicle, permitting him to drive respondent's vehicle. The soldier driver thus was covered under the umbrella of an authorized recreational status. Such status was in the interest of the respondent employer for morale maintenance of the soldier. The Army procedure and custom in effect at the time and place, including what was done in this case, namely, the trip ticket and the permission of respondent to drive the vehicle assumed that the recreational driving at the said time and place was in the nature of authorized Army activities. Respondent had clothed the soldier's driving with official sanction and had granted him express permission to drive the vehicle. In that sense his trip was actually official business (R. 4).

The District Court, after hearing, denied respondent's motion for summary judgment (R. 4-5).

The evidence at the trial was as follows:

The accident occurred on the evening of March 3, 1949, at about 10:30 o'clock P.M. (R. 58). Plaintiff was sitting in another U. S. Army vehicle, parked at the end of the Breakwater Road at the town of Agana on the Island of Guam (R. 58). Plaintiff's vehicle was struck by a ¾-ton Army weapons carrier being driven by Corporal Joe Seabourn of the United States Army (R. 61). Plaintiff was seriously and permanently injured (R. 35-36, 39-40).

Soldiers stationed on Guam technically were on duty 24 hours per day (R. 30). At the time of the accident, Seabourn was a supply clerk stationed on Guam with a service detachment (R. 27). In the performance of his duties, he occasionally drove an Army weapons carrier (R. 27). On March 3, 1949, he had been issued an Army operator's permit for any vehicle up to 2½ tons (R. 27).

About 8:00 A.M. on the day of the collision, Seabourn, while on authorized pass for recreation (R. 27), and two other soldier buddies, also on pass—Sgt. Vincent and Pfc. Schmidt—went to a tavern about a mile from Harmon Field and spent most of the morning drinking (R. 132). In the afternoon, the three hired a cab and went about Agana, drinking, until 6:30 P.M. when they returned to the base (R. 132).

At 8:00 P.M. Seabourn, still on authorized pass, went to Sgt. Stiles of his company and obtained for recreational use, with knowledge of all concerned and in accordance with the Army custom, an official

"trip ticket" for a ¾-ton weapons carrier assigned to the 374th T.C.W. (R. 129,28). The trip ticket was good for that vehicle until 9:30 A.M. the next day. (It was made out to Pfc. Carbera [R. 28]).

Seabourn and his companion, Pfc. Richard Schmidt, both testified that trip tickets for vehicles in service stock always were passed around between the men working in that section, regardless of the name of the individual to whom the trip ticket was made out (R. 126). This was the usual procedure (R. 127); and it applied whether the vehicle was to be used for work or recreation.

Vehicles were necessary for recreational purposes in view of the distances on Guam between station points and the authorized Army recreational facilities (R. 127). All officers and enlisted men in Seabourn's unit followed the practice of thus circulating trip tickets (R. 131).

Thus, Seabourn's superior officers had jeeps. The enlisted men, as did Seabourn on the occasion in question, used weapons carriers (R. 131).

This practice had prevailed on Guam for at least fifteen months prior to the accident (R. 130).

Having at 8:00 P.M. on the day in question obtained the official trip ticket authorization, the proper authorities at the motor pool gave Seabourn the weapons carrier (R. 128). After this, he and his two companions, he driving the vehicle, checked out of the base at the motor pool dispatch station, in the usual manner. They then went to the official Army

NCO Recreational Club and from there to Agana (R. 128). Neither Schmidt nor Vincent drove the carrier. They left Seabourn before the collision (R. 132).

The District Court for the Northern District of California, Southern Division, found that petitioner suffered severe bodily injuries as a result of the accident; that the accident was entirely due to the negligence of the soldier; that the soldier was, at the time of the accident, off duty; that the soldier had obtained unauthorized possession of the vehicle; that the soldier's use of the vehicle was not for a purpose authorized by his commanding officer; that the soldier was merely off on a frolic of his own; and the Court concluded that the soldier, an employee of respondent, was not acting within the course and scope of his employment (R. 50).

The first Memorandum Opinion, filed by the Honorable Judge Roche on June 4, 1952, contains an erroneous statement of fact. The opinion states (R. 45):

> "On the other hand Sgt. Stiles states that the vehicle was to be used for official business only; that because the vehicle was on 24 hours dispatch and was used officially by all men in the Section who had permits; that it was good on the post only."

This statement is based on the affidavit of Sgt. Stiles (R. 155). But this affidavit was admitted subject to a motion to strike, which motion was granted (R. 48). Since on reconsideration there was no fur-

ther evidence adduced there still is no basis whatsoever for the trial court's opinion.

An important portion of the memorandum opinion follows:

> "Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officer in charge, it would not make the United States liable. . . By the Tort Claims Act the United States has consented to be sued for the negligence of its employees only when they are acting within the scope of their employment which, in the case of military personnel, means acting in the line of duty. To determine whether the person inflicting the injury was an employee so acting, we look to Federal law and decisions. . ." (R. 45.)

On October 22, 1952, judgment was entered for respondent. On November 21, 1952, plaintiff filed her Notice of Appeal (R. 53). On September 8, 1954, the Ninth Circuit filed its opinion, affirming the judgment below (R. 168). Important portions of this opinion follow:

> "We disagree with appellant's contention that our decision in *Murphey v. United States,* supra, when laid off against the facts revealed by the record before us, is dispositive of the vital and controlling issue in the instant case. We are fully persuaded that the *Murphey* case is clearly distinguishable on the facts. . ." (R. 174.)
>
> * * * * * * *
>
> "As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of

federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach *only* when the act was committed while the soldier was 'acting in the line of [military] duty.' This careful delineation provides a clear line of demarcation between Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical 'master and servant' cases where the rule of respondeat superior is normally applied..." (R. 177-178.)

* * * * * * *

". . . as to . . . civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law to the commonplace 'master and servant' cases, would apply. But in dealing with the problem of federal liability for tortious acts of members of the military and naval forces a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine..." (R. 178-179).

Plaintiff thereupon petitioned the U. S. Supreme Court for a Writ of Certiorari, which was granted (R. 183). After briefing and oral argument, the Supreme Court issued its mandate as follows:

"On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause be, and the same is hereby vacated, the case being controlled by the California doctrine of respondeat superior, and this cause be, and the same is hereby remanded to the United States District Court for the Northern District of Cali-

fornia for consideration in the light of that governing principle." (T.R. 1).

Plaintiff thereupon made her motion for judgment, or, in the alternative, for a new trial (T.R. 2). This motion was denied, the court holding that Corporal Seabourn was not acting within the scope of his employment, and judgment was entered in favor of defendant upon the Findings of Fact set forth in its memorandum opinion and the Findings of Fact theretofore made and filed October 21, 1952, which were expressly readopted (T.R. 15). Judgment was entered July 12, 1956, and plaintiff appealed on July 25, 1956.

SPECIFICATION OF ERRORS.

1. THE TRIAL COURT ERRED IN FINDING THAT SEABOURN OBTAINED UNAUTHORIZED POSSESSION OF THE WEAPONS-CARRIER.

This finding is erroneous in that the uncontradicted evidence is that Seabourn obtained possession of the weapons-carrier for purposes sanctioned by and in accordance with the long-established army custom, practice and standard operating procedure.

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2. THE TRIAL COURT ERRED IN FINDING THAT SEABOURN WAS ON A FROLIC OF HIS OWN AND WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

This finding is erroneous for these reasons: First, the accident occurred while Seabourn was engaged in a series of authorized acts, namely, driving the vehicle

for recreation and transporting himself and other personnel to and from the recreation facilities provided for by the government, the NCO Club; and Second, these authorized acts were, under the peculiar circumstances of Seabourn's overseas service, for a governmental purpose, the improvement of morale; and as such, under the rule of this Circuit in *Murphey v. U.S.*, 179 Fed. 2d 743, were done within the scope of Seabourn's employment. The rule of the *Murphey* case has been reaffirmed by the U.S. Supreme Court in this very case.

ARGUMENT.

I. THE TRIAL COURT'S FINDING THAT SEABOURN OBTAINED UNAUTHORIZED POSSESSION OF THE WEAPONS-CARRIER IS CONTRARY TO LAW AND THE EVIDENCE. THIS COURT SHOULD MAKE THE CONVERSE FINDING.

By merely repeating the findings it previously made prior to the remand of the U.S. Supreme Court, the District Court has compounded its previous errors and now forces plaintiff to argue twice almost the same contentions which led the Supreme Court once to reverse in her favor. The most important of these contentions relates to the issue of Seabourn's authority to use the army vehicle for recreation. The finding of fact (R. 51) that Seabourn obtained unauthorized possession of the weapons-carrier was the basic reversible error in the trial court's first judgment. The government's liability rests on the true fact to the contrary. Seabourn *was* authorized to use the weapons-carrier for recreation.

There can be no question of proof of Seabourn's authority so to use the vehicle. The evidence is uncontradicted. (The only contradiction appears in an affidavit of a Sergeant Stiles which on motion of plaintiff was stricken from the record. [R. 48].) Under a long-standing custom, practice, and standard operating procedure of the military on Guam, the vehicle, if not in use for other army business, was driven at night by members of Corporal Seabourn's detachment for recreational purposes.

> "Q. State whether that was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it.
>
> A. Well, everybody who drove it used it for the same thing I was using it for. When they weren't using it in service stock they drove it at night." (R. 28, Deposition of Seabourn.)

> "Q. State whether the trip ticket in question while issued therefor for official business was by this usual procedure also for your use of the vehicle for recreation.
>
> A. If there was a trip ticket the vehicle could have been used for official business or for recreation." (R. 9, Deposition of Schmidt.)

> "Q. State the individuals in your section who followed that procedure, including officers and enlisted men.
>
> A. All the men in the Section used the trucks and some of the men that I remember who were in my section were PFC Jack Slinker, Sgt. Raphael Herrera and Lt. John Reese, the same ones I mentioned before." (R. 13, Deposition of Schmidt.)

"Q. State the individuals in your Section who followed that procedure, including officers and enlisted men.

A. Well, sir, everybody, all the officers had a jeep assigned to them. They drove them and the enlisted men had three weapons carriers, I believe, to use. There was Lt. Luther, he had a jeep assigned to him, and Lt. Werb, he had a jeep assigned to him. The other two weapons carriers, I don't remember who drove them but I know they drove them at night." (R. 31-32, Deposition of Seabourn.)

It was also part of that custom, practice and standard operating procedure for the military individual in securing the vehicle for recreation to proceed to the motor pool, ask for the truck, drive it to the dispatcher at the dispatch window and receive a trip ticket. Apparently, rather than reissue a new trip ticket each time the truck was released, the same trip ticket would be passed around from new driver to new driver. This was done by Corporal Seabourn on the night in question.

"Q. When you set forth in your statement, 'The trip ticket was good for that vehicle until 9:30 a.m. Friday, March 4,' state the mode or method of obtaining such a trip ticket, and by whom it was issued.

A. Well, sir, I don't remember whether they had let us out on 24-hour dispatch. I don't remember if it was issued. We just went to the motor pool and asked them for the truck if it wasn't out to the Section and drove it to the window and they would give you the trip ticket." (R. 31, Deposition of Seabourn.)

"Q. When Seabourn sets forth in his statement, 'the trip ticket was good for that vehicle until 9:30 a.m. Friday, March 4' state the mode or method of obtaining such a trip ticket, and by whom it was issued.

A. I don't know who issued the trip ticket which Seabourn had if he had one, but the method of obtaining trip tickets was to take the vehicle, which was kept in the squadron area, down to the dispatch office and obtain a trip ticket from the dispatcher who was on duty. There was a dispatcher on duty 24 hours a day." (R. 12, Deposition of Schmidt.)

"Q. Is it correct, is it not, that the trip tickets including the said trip ticket mentioned, in service stock were always passed around between the men working in that Section, regardless of the name of the individual to whom the trip ticket was made out?

A. Yes sir, that is correct, although I don't know if this vehicle had a trip ticket." (R. 9, Deposition of Schmidt.)

"Q. Is it correct, is it not, that the trip tickets, including the said trip ticket mentioned, in service stock were always passed around between the men working in that Section, regardless of the name of the individual to whom the trip ticket was made out?

A. Yes, Sir." (R. 28, Deposition of Seabourn.)

"Q. Is it not a fact that when you got back at that time you got a trip ticket for the said weapons carrier assigned to the 374th T.C.W.?

A. Yes, Sir.

Q. Is it not true that you picked up this trip ticket from Sergeant Stiles of your company?

A. Yes, Sir." (R. 28, Deposition of Seabourn.)

"Q. Is it not a fact that when he got back at that time he got a trip ticket for the said weapons carrier assigned to the 374th T.C.W.?

A. Yes, he picked up a trip ticket for the said weapons carrier." (R. 18, Deposition of Vincent.)

The above custom, practice and standard operating procedure had existed in Seabourn's Detachment *for at least a year and three months before the accident.*

"Q. For how long a period to your knowledge was the procedure, noted above, with respect to the mode and method of trip tickets in effect on the Island of Guam?

A. Well, Sir, I don't know that. Everything, as far as I know was always the same since I got here." (R. 30, Deposition of Seabourn.)

"Q. For how long a period of your knowledge was the procedure, noted above, with respect to the mode and method of trip tickets covering Army motor vehicles, in effect on the Island of Guam?

A. As long as I was over there, and I was over there for about fifteen months, as of March 3, 1949." (R. 11, Deposition of Schmidt.)

Lieutenant Werb, Seabourn's commanding officer (R. 16), also used this procedure.

"Q. Give the names, rank, grade and stations of the various people in the United States Armed Forces who, to your knowledge, authorized or followed the noted mode and method of trip tickets and procedure, prior to the date of the collision.

A. Everyone in my outfit used this procedure. . ." (R. 11-12, Deposition of Schmidt.)

"Q. State the individuals in your Section who followed this procedure, including officers and enlisted men.

A. Well, Sir, everybody. . . There was Lt. Luther, he had a jeep assigned to him, and Lt. Werb, he had a jeep assigned to him. . ." (R. 32, Deposition of Seabourn.)

As noted above Corporal Seabourn followed the custom, practice, standard operating procedure in securing the weapons-carrier, and his purpose was the purpose sanctioned by this custom.

"Q. What was his purpose in using that weapon's carrier, as far as you know?

A. For recreation; he wanted to go to Twentieth Air Force Headquarters, to the NCO Club there." (R. 17, Deposition of Vincent.)

Thus the trial court's finding that Seabourn had unauthorized possession of the army vehicle is factually incorrect. It is wholly without support. Possession of the vehicle was sanctioned not only by the army custom and practice, but in this case specifically by his securing a trip ticket and checking out the vehicle while the official motor pool army dispatcher. And even assuming that this army custom and practice might have technically violated some general Army

Regulations still in the eyes of the law such hypertechnicality should not and *does not affect the rights of an injured third person.* The injured third person is the exception. "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or *by want of ordinary care,* allows the agent to believe himself to possess." Calif. Civil Code § 2316. In determining whether a particular act is reasonably contemplated by the employment, "the custom and usage of a particular employment . . . should be considered." *Employers' Etc. Corp. v. Indus. Acc. Com.,* 37 C.A. 2d 567, 573. And, since the entire evidence is by way of deposition, this Court may make the proper finding that Seabourn's use *was* authorized. *Murphey v. U. S.* 179 Fed. 2d 743.

But the question of technical violation of Army Regulations is more or less moot, although the trial court continues to advert thereto (T.R. 4, 11). As respondent stated in its trial brief below, "The government's position has consistently been that it is responsible only if the enlisted man was operating the vehicle under the circumstances and conditions prescribed by Army Regulations 700-105." This was the view of this Court upon the prior appeal, wherein it erroneously held that the Government's liability was governed by "Federal law and decisions."

But appellant argued successfully before the United States Supreme Court that, assuming *arguendo,* the vehicle was not operated according to the strict terms of Army Regulations 700-105, still the government would be liable because of the injured third person.

Appellant contended, on the one hand, that the violation of an unenforced and ignored Army Regulation could not be relied upon by the government to avoid liability, for to so do would permit the government to immunize itself by the unfair device of enacting regulations bounding the scope of employment of its servants while at the same time in practice and in fact authorizing its servants to perform the proscribed acts. This would be immunity by legal fiction. And, on the other hand, appellant argued that the practice on Guam was itself evidence of authority, of permission, and of the "scope" of employment for soldiers stationed on Guam at the time of the accident. The United States Supreme Court, in our case, of course, rejected the position of the government and agreed with appellant. It held that the issue of scope of employment is governed by the California rule of respondeat superior, not federal law, decisions, or regulations, whether they were enforced or not.

II. UNDER CALIFORNIA LAW AS FOUND BY THIS COURT IN MURPHEY v. U. S., AS RECENTLY REAFFIRMED BY THE SUPREME COURT IN THIS VERY CASE, SEABOURN'S AUTHORIZED USE OF THE ARMY VEHICLE FOR RECREATION WAS WITHIN THE SCOPE OF HIS EMPLOYMENT. IT DOES NOT MATTER THAT THAT USE WAS NEGLIGENT, NOR THAT THE USE GAVE HIM PERSONAL ENJOYMENT. UNDER THE PECULIAR FACTS AND CIRCUMSTANCES OF THIS CASE, A GOVERNMENTAL PURPOSE WAS BEING SERVED WHICH FIXES LIABILITY UPON THE GOVERNMENT UNDER THE RULE OF RESPONDEAT SUPERIOR.

In its memorandum opinion, the trial court held, "Seabourn was neither 'directly or indirectly serv-

ing his master' within the scope of his employment, because he was serving only his *own personal desires* not at all connected with any recreational activities authorized by his employer" (R. 11). But in this the trial court errs.

A. Contrary to the Erroneous Finding of the Trial Court, the Specific Act of Driving the Army Vehicle for Recreation Was Itself an Authorized Act, and Consequently Seabourn's Negligence in Performing That Act Gives Rise to Governmental Liability.

Appellant asks this Court to view the bare facts of the record in the light of the actualities of overseas military service upon Guam at the time of the accident. The Island of Guam is 32 miles long and 4 to 10 miles wide. It is located at least 6,000 miles from the homes of most military personnel stationed there. The military considered the soldier at that place to be on duty 24 hours a day. Actually, in keeping with the realities of morale maintenance, soldiers were individually permitted, by going through customary channels, to use military vehicles for recreational purposes. As seen heretofore there can be no doubt that this practice prevailed, and had prevailed for many months prior to the accident.

These facts illustrate what this case is not. This is not the case where a soldier is on "stateside" pass seeking "stateside" pleasure. This is not anything like the case where a soldier on leave in the United States uses his own automobile to go to and from his home, as in *U.S. v. Eleazer,* 177 F. 2d 914. This is not the case where a flier makes unauthorized use of

an airplane in the United States and causes personal injuries, as in *King v. U.S.,* 178 F. 2d 320.

This *is* a case like *Murphey v. U.S.,* 179 F. 2d 743 of this circuit, and the cases and analogies cited and relied upon *by this very Court,* each of which have received the tacit approval of the United States Supreme Court *in this very case.*

1. In the Factual Context of This Case the Soldier in Using the Vehicle for His Own Recreation Was in Part Serving Governmental Purpose. The Well-Reasoned Case of Murphey v. U. S. Is Direct Authority to That Effect.

California law states the applicable rule as follows:

> "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, NO NICE INQUIRY WILL BE MADE AS TO WHICH BUSINESS THE SERVANT WAS ACTUALLY ENGAGED IN WHEN A THIRD PERSON WAS INJURED; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." (Emphasis added.)
>
> *Ryan v. Farrell,* 208 Cal. 200.

In the case at bar we have a seriously injured third person. Do we have an individual soldier who was combining his own business with that of his master? The *Murphey* case of this Circuit holds that we do. The rationale of its holding may be stated as follows: When the type of employment is such that the employee is almost constantly under the employer's wing;

when the employee is peculiarly isolated from the usual recreational pursuits; when the employer has unusual control over the hours, area, or instrumentality in which off-time is spent; and when, because of the monotony of the employment, the employer is of necessity directly concerned with the morale and recreation factor, the "scope of employment" is broadened to include recreational activities, including driving for recreation. And this is so as much for an individual employee as it is for several. This holding fits this case to a "T".

The trial court believed that the *Murphey* case was inapplicable and distinguishable. But consider the parallel facts. In the *Murphey* case, the soldier was stationed with about twenty other men at an *isolated encampment* in Northern California. In order to keep up the *morale* of the men the commander provided an army truck for nightly visits to Klamath for "*entertainment,* movies, etc." On the night in question, the soldier *while on pass* drove some men to town and parked the truck at a designated location. The commanding officer testified that the soldier was not free to use the truck again until such time as the group was ready to return to the encampment. Nevertheless, in violation of the army regulations, the soldier and a buddy *visited a saloon,* picked up two women, and started in the truck toward a nearby Indian ceremonial. During the trip the truck hit a pedestrian and killed her. The trial court found that the soldier was not acting within the scope of his employment

because the vehicle was not to have been moved and was not to have been used for *personal pleasure.* But this Court reversed, holding:

> "The government brief concedes that Brander was acting within the scope of his employment in driving himself and other soldiers into the town of Klamath for their recreation, but contends that such recreational employment of the truck by the sergeant alone could not be a military employment. We do not agree. Improvement of morale of a single soldier is as much military in character as of several . . ."
>
> * * *
>
> "We think the overriding purpose in Brander's employment in the use of the truck in the town of Klamath is the *improvement of the morale* of soldiers in seeking 'entertainment.' The 'movies, etc.' certainly would include the Indian Ceremonial. The government being liable as a private person in California, it is liable where the truck was in use for the broad purpose for which it was employed by Brander, even though he had instructions that he was not 'free' to use it in a particular manner accomplishing that purpose . . ."
>
> * * *
>
> "Here Brander was seeking the specified entertainment which would improve his military morale. That he was 'directly or indirectly serving his master' in so doing is none the less within the scope of that employment, because he was serving his own desire and that of the other sergeant *seeking recreation* in taking the latter's two lady friends to the Ceremonial." (Emphasis added.)

There is one essential difference between the *Murphey* case, *supra,* and the case at bar, and it is favorable to this appellant. Here Corporal Seabourn not only was authorized to transport personnel to places of recreation; he was authorized to drive the vehicle for his own recreation. Where in the *Murphey* case the latter authority was deemed "incidental" to the former authority, here there is no need to indulge in implication. Our case is therefore stronger.

The *Murphey* case holding, namely, that the pursuit of recreation under similar factual circumstances by an individual soldier is within the scope of his employment because the governmental purpose of improvement of morale is being served, conforms with California law.

For example, consider the numerous workmen's compensation cases dealing with the peculiar factual situation of confinement and morale problems. "Similarly, it is held that employees are in the course of their employment while properly spending their time, when off duty, in a bunkhouse furnished by the employer and in which they are compelled to live." 27 *Cal. Jur.,* 393, Workmen's Compensation, § 90. See also: *Larson v. Industrial Accident Commission,* 193 Cal. 406; *State Compensation Insurance Fund v. I.A. C.,* 194 Cal. 28; *Employer's Liability Assurance Corp. v. I.A.C.,* 37 C.A. 2d 567; *Union Oil Co. v. I.A.C.,* 211 Cal. 398; *Truck Insurance Exchange v. I.A.C.,* 27 Cal. 2d 813; *Pacific Indemnity Co. v. I.A.C.,* 26 Cal. 2d 509; *West v. I.A.C.,* 79 C.A. 2d 711; *Jiminez v. Liberty*

Farms Co., 78 C.A. 2d 458; *Pacific Employer's Ins. Co. v. I.A.C.,* 77 C.A. 424.

Moreover, the pursuit of recreation for the employer's purposes of morale has recently been recognized by the California courts as broadening scope of employment under respondeat superior of employees who unlike soldiers or bunkhouse workers are not even subject to such rigid control and confinement. In *Boynton v. McKales,* 139 C.A. 2d 777, a salesman attended a salesmen's banquet, became intoxicated from liquor provided by the employer, and on the way home struck a pedestrian. He pleaded guilty to a violation of Vehicle Code § 501. The defense was that the occasion was a "social" one. But the Court held (p. 789): "The attendance at a social function, although not forming part of the normal duties of the employee, may come under the 'special errand rule' if the function of the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend." The Court said, "It is not necessary that the servant is directly engaged in the duties which he was employed to perform, but included are also missions which incidentally or indirectly contribute to the service, incidentally or indirectly benefit the employer." The benefit to the employer found by the Court was that the social occasion contributed to the "continuity of employment." These last words are mere synonyms for "morale."

2. The Fact That Seabourn Drunkenly and Negligently Performed the Authorized Act of Driving for Recreation Does Not Relieve the Government of Liability.

The trial court found that Seabourn was on a frolic, "drinking and running around" (T.R. 11). This finding misses the most important distinction between this case and the "chamber of horrors" exception noted in the *Murphey* case wherein the Court stated, "We are not holding that in any case where a soldier is on a frolic of his own he can make the Government liable simply because he there found entertainment" (T.R. 10). *But in the case at bar the recreational driving was authorized!* Nowhere, presumably, except upon an isolated, overseas post would the practice of issuing vehicles to soldiers for recreational driving exist. But it did here, so should the Government be relieved of liability because the soldier added drinking to his driving? The answer is no. As the Court said in *Christian v. U.S.,* 184 F.2d 523, 525 (6th Cir. 1950):

> "It is true that a master would not be exonerated on the theory that his servant was not employed to get drunk and therefore departed from the scope of his employment in doing so. To the contrary, drunkenness on the part of the agent is an act of negligence for which his employer becomes liable, if the servant otherwise is acting within the scope of his employment."

The rule of course is that the doing of an authorized act in a wrongful or prohibited manner will not preclude responsibility of the employer. *Restatement of Agency,* §§230, 229; *Fields v. Sanders,* 29 Cal.

2d 834, 839; *Haworth v. Elliott,* 67 C.A.2d 77, 81; *Hiroshima v. P.G.&E.*, 18 C.A.2d 24.) The correct test to apply to Seabourn's conduct is stated by the California Court:

> "The test is not whether the wrongful act itself was authorized but whether it was committed *in the course of a series of acts of the agent which were authorized by the principal* and while the agent was still occupying himself with the principal's business within the scope of his added employment." (Emphasis added.)
>
> *Deevy v. Tassi,* 21 Cal.2d 109, 125.

B. Even If Seabourn's Authority to Drive Was Limited to Transportation to and From Government-Provided Recreation Facilities, His Acts Were Within His Scope of Employment.

The trial court held that the issue of "frolic and detour" was not presented in this case, because "Seabourn was not in the course of his employment when he left base" (T.R. 13). Appellant contends that this holding again misses another aspect of Seabourn's authority—the authorized use of the vehicle in going to and from the government-provided recreational facility—the NCO Club. This was the purpose testified to by one of Seabourn's companions:

> "Q. What was his purpose in using that weapon's carrier, as far as you know?
>
> A. For recreation; he wanted to go to Twentieth Air Force Headquarters, to the NCO Club there" (R. 17).

Considering this to be so, then appellant contends that the *Murphey* case is practically on all-fours

No material distinction exists between that case and the instant case.

The dissenting judge in the *Murphey* case wrote the opinion for this Court upon our prior appeal. He felt that the *Murphey* case involved the question whether the negligent act was committed while engaged in such a deviation from employment, *i.e.,* frolic, as to relieve the government of liability. Appellant contends that, so considered, the *Murphey* case is even stronger authority for her position here, since the Court's distinctions are immaterial. And it should be noted that the trial Court below in its memorandum opinion adopted some of these very same alleged distinctions (T.R. 10). Since the Supreme Court vacated the judgment of this Court on its prior appeal, the adoption by the trial court of these disapproved distinctions should be suspect.

The trial court and this Court sought one distinction in the fact that unlike Seabourn, the driver in the *Murphey* case was acting under "specific authorization of his commanding officer" to take the truck into town "for pleasure under instructions" for "entertainment, movies, etc.", another that the majority of the Court thought that the "official permission" thus granted was broad enough to include a visit to an Indian dance being held a short distance outside of this town and that this was "digression", another that "it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence", another that the soldier there was seeking "specified entertainment", another that

the soldier's superior officer knew that as incidental acts the truck was employed to reach places of entertainment outside of Klamath.

But in the case at bar there is evidence that the use of army vehicles for "recreation" to go to the NCO Club and elsewhere and back to post had been a long established army practice indulged in by all members of the soldier's post, officers included. It is a certainty from uncontradicted evidence that his superior officers, specifically Lt. Werb, knew of this long established custom. Moreover, the *Murphey* case driver had visited a saloon. For what purpose? Obviously, to drink! Indeed, he had picked up two lady friends as passengers!

The trial court in the *Murphey* case also found that special permission was required to use the vehicle for the pleasure of the men to go to any place other than Klamath, and that the truck driver was not authorized to operate the vehicle for his use or for any other use than that of driving to Klamath and parking the vehicle by the side of a building. Here, likewise, it is claimed that army regulations governing the use of the vehicle were violated.

The similarity between the *Murphey* case and the instant case is startlingly apparent, however, from the court's discussion of the "overriding specific purpose" allegedly present in the *Murphey* case, to-wit, improvement of morale in seeking "entertainment, movies, etc.", even though the truck driver "had instructions that he was not free to use it in a particular manner accomplishing that purpose."

In the case at bar Seabourn was authorized to use the vehicle for "recreation". We find no distinction between "entertainment" and "recreation", or "movies, etc." and "recreation" at an NCO Club. We contend that the issue is clearly presented by the evidence whether Seabourn had departed from and resumed his employment. Furthermore, if the *Murphey* case driver was not on such a departure or frolic as would preclude liability, then neither was Corporal Seabourn.

CONCLUSION.

The California Court has aptly said:

> "The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment . . . Such injuries are one of the risks of the enterprise . . ."
>
> *Carr v. Wm. C. Crowell Co.,* 28 Cal. 2d 652.

The Restatement also states:

> "Since the phrase 'scope of employment', is used for the purposes of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should

be considered as one of the normal risks to be borne by the business in which the servant is employed."

Rest. Agency, §229, Comment a.

In the case at bar appellant was seriously and permanently injured by reason of the drunk driving of Corporal Seabourn. She suffered lacerations (R. 35), fractured transverse processes of three vetebrae (R. 39), scarring and restricted motion of her right leg (R. 35-36), recurring and persistent headaches, pain in the chest, backache and chronic back strain, uncontrollable trembling and shaking of the muscles of her legs' functional involvement, all resulting in a loss of 35% of her ability to do general work (R. 40). These conditions are permanent (R. 39), and involve, and would involve, further surgery and treatment resulting in medical expenses alone well over $2,000.00 (R. 39).

It is not just or fair that she be forced to bear this loss.

It is respectfully submitted that the judgment for defendant should be reversed and that judgment should be ordered in favor of plaintiff and against defendant for such amount as the trial court on that issue alone should decide is meet and proper.

Dated, San Francisco, California,
February 27, 1957.

Respectfully submitted,
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